No. 11,327

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL A. PORTER, Administrator, Office of Price Administration,

Appellant,

vs.

KENNETH W. TROWBRIDGE, doing business as Kenneth W. Trowbridge Co., and PRECISION MOTOR PARTS,

Appellees.

BRIEF FOR APPELLANT.

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Deputy Administrator for Enforcement

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BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal by the Price Administrator from a final judgment of the United States District Court for the Northern District of California, Southern Division, dismissing an action brought under Section 205 (a) and 205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S.C. App. Section 925 (a) and (e)), to restrain the defendant from further violating the Act and applicable regulations issued thereunder and to recover from him statutory damages on account of past violations.

The judgment dismissing the action was entered on December 10, 1945. (R. 41.) Notice of appeal was filed February 27, 1946. (R. 44.) Jurisdiction of the District Court was invoked under Section 205 (c) of the Act (50 U.S.C. App. § 925 (c); jurisdiction of this Court is invoked under section 128 of the Judicial Code. (28 U.S.C. § 225.)

STATUTES AND REGULATIONS INVOLVED.

The instant proceeding involves Sections 205 (a) and 205 (e) of the Emergency Price Control Act of 1942 as amended: Sections 5, 6, 9, and 15 of Maximum Price Regulation 452, issued August 19, 1943, and effective September 2, 1943 (8 F.R. 11572); and Sections 3403 and 3441 (a) of the Internal Revenue Code, 26 U.S.C. 3403, 3441 (a). The relevant provisions of each are set forth in the appendix.

STATEMENT OF FACTS.

The complaint charged defendant with having sold rebuilt automotive parts at prices in excess of the maximum prices established by Maximum Price Regulation 452. It prayed for the recovery of statutory damages in the amount of $25,077.00 (being three times the amount, $8359.00, by which the prices at which parts were sold exceeded the legal maximum) and an injunction restraining the defendant from further violating the regulation or any other regula-

tion establishing maximum prices for rebuilt automotive parts. The answer of the defendant denies the material allegations of the complaint.

The plaintiff propounded interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure concerning the sales involved in the action. (R. 17-19.) The defendant objected to the interrogatories upon the ground that plaintiff could not compel the defendant to testify in this proceeding (R. 19) and the Court sustained the objection. (R. 21.)

Thereafter, the parties entered into a stipulation (R. 27-28) which insofar as here material reads as follows:

"STIPULATION

It is hereby stipulated and agreed by and between the above-named parties that:

1. On March 31, 1942, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts. On said date, the Federal Manufacturers' Excise Tax was not added by defendant to the price paid by the purchasers of said rebuilt automotive parts; nor was said tax then considered or included by defendant in his calculation of producing costs as a basis of arriving at his ceiling prices.

2. Subsequent to the 2nd day of September, 1943, and prior to the filing of the Complaint in the above-entitled action on the 2nd day of August, 1944, the defendant, doing business in the City and County of San Francisco, State of

[30] California, sold and offered to sell, as a manufacturer, rebuilt automotive parts at ceiling prices, and, in addition, defendant collected, from the purchasers thereof, sums totalling $8359.00 to cover the Federal Manufacturers' Excise Tax. None of said sales were made for use or consumption other than in the course of the trade or business of the purchasers."

The Court held that the defendant was entitled to add the tax referred to in the stipulation[1] and granted judgment for the defendant. The only questions presented on this appeal are: first, whether the Court erred in holding that the defendant was entitled to add the tax to the maximum prices established by the regulation; and secondly, whether the Court erred in sustaining the defendant's objection to plaintiff's interrogatories.

SPECIFICATIONS OF ERROR.

1. The Court erred in holding that defendant's addition of the manufacturers excise tax to his base date list prices did not constitute an overcharge in violation of the Regulation.

2. The Court erred in sustaining defendant's objection to plaintiff's interrogatories, on the ground that the instant proceeding constituted a "criminal case", within the meaning of the Fifth Amendment.

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[1]Namely the tax imposed by Section 606(c) of the Revenue Act of 1933 (26 U.S.C. 3403c).

ARGUMENT.

I.

SECTION 15 OF MAXIMUM PRICE REGULATION 452 DOES NOT PERMIT BASE DATE LIST PRICES TO BE SUBSEQUENTLY INCREASED ON ACCOUNT OF TAXES IN FORCE ON THE BASE DATE.

Under Section 6 of the Regulation, parts for which a seller had established a list price on March 31, 1942, the base date, may not thereafter be sold at a higher price. Section 6 makes provision for the establishment of new list prices, but only with the approval of the Office of Price Administration.

There is no showing in the record that defendant obtained Office of Price Administration approval for his Price List No. 6 of September 1, 1943, which increased all prices by 5% over those contained in Price List No. 5 in effect on the base date.

Defendant, however, seeks to derive authority for his new price list from the provisions of Section 15 of the Regulation. Such attempt must fail. Only Section 15 (a) deals with taxes in effect on the base date.[1] It reads as follows:

> "Sec. 15. *Federal and State taxes.* (a) Any tax levied by any statute of the United States or statute or ordinance of any state or subdivision thereof which the manufacturer on March 31, 1942, added to the price paid by the purchaser shall not be included in the maximum price but

[1]Section 15(b) deals with taxes which have come into effect after the March 31, 1942 base date; it is clearly inapplicable. So are Section 15(c) and (d) which deal with taxes paid on parts purchased for resale, and with the transportation tax, respectively.

> may be collected by the manufacturer in addition to the maximum price, if such tax is stated separately from the purchase price, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part."

Under this provision a tax in effect on the base date may continue to be added to the maximum price, if it was so added on the base date. This arrangement is, of course, a simple application of the general principle of base period price-freezing which governs the Regulation. It follows logically that a tax in effect on the base date which was *not* then added to the price may not subsequently be added thereto. It is irrelevant whether this conclusion is derived from the provision of the Regulation or by holding, as defendant argued in the Court below (R. 35), that his case is a "*casus omissus*". For, a "casus omissus" in a provision, granting an exception from the general rule which sets the maximum price at the base date list price, simply means that the "omitted" situation will not be excepted.

This analysis should suffice to support the interpretation here urged, since it is clearly required by the terms of the Regulation. Defendant's objection to the Regulation as so interpreted, on the ground that it exceeds the Administrator's authority by extending it to the tax field (R. 37-41), is not available in this forum, since it constitutes an attack on the validity of the Regulation which is reserved to proceedings

before the Emergency Court of Appeals. Section 204(d) of the Act.[1]

Since these objections constitute the bulk of defendant's case below, it may be useful to demonstrate why they are, in fact, without substance. The objections may be stated as follows:

1. The manufacturers' excise tax is not a part of the price, and as such is outside the Administrator's regulatory power.

2. Defendant should not suffer from his failure to pay the tax on the base date, since he was justified in so doing.

1. Defendant argued in the Court below that the excise tax may not be considered as part of the price, because Section 3441(a) of the Internal Revenue Code so provides. That provision, however, is solely concerned with the basis on which the 5% tax is to be calculated; clearly if that basis included the tax, the seller would be paying a tax upon a tax. This question is in no way related to the price control system embodied in the Regulation. In fact, Section 15 specifically enumerates the cases in which the tax is, or is not, part of the sales price. Defendant, himself, has treated the excise tax as part of his sales price, by including it in the higher prices in his Sales List No. 6.

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[1]*Lockerty v. Phillips*, 319 U.S. 812; *Yakus v. United States*, 321 U.S. 414; *Rosenzweig v. United States* (C.C.A. 9th), 144 Fed. (2d), cert. den. 323 U.S. 764; *Bowles v. Lighthouse Oysters Inc.* (C.C.A. 9th, 1945), 151 F. (2d) 435, 437.

The fact of the matter is, of course, that the Administrator cannot effectively control prices unless he can control the incidence on the purchaser of all the elements which make up the consideration paid to the seller. There are many price factors, like wages, taxes, duties, freight rates, whose determination is outside the Administrator's scope of authority. Yet to conclude from that fact that the seller may pass these charges on to his customer without regard to applicable price ceilings, would be to make a mockery and an illusion out of price control.

Anything given by the purchaser in consideration of the commodity or service obtained is part of the purchase price controlled by the Administrator. Price control depends on freezing not merely the receipts of the seller, but especially the total outlay of the purchaser. Section 205(e) defines "overcharge" as "the amount by which the consideration exceeds the applicable maximum price." Thus, even if the tax were not to be considered as a part of the price, its addition thereto constitutes an overcharge.

This has been fully recognized whenever the question of passing on taxes or other charges in addition to the maximum price has come before the Courts. In *United States Gypsum Co. v. Brown* (C.C.A., 1943), 137 F. (2d) 360, cert. den. 64 S. Ct. 88 (1943), the Emergency Court ruled that a seller who sells on a delivered basis, must absorb the 3% federal transportation tax, imposed by Section 620 of the Revenue Act of 1942, as part of the transportation cost. In

discussing objections to its holding which were similar to those here raised by defendant, the Court stated:

> "The Emergency Price Control Act and the Price Regulations here involved are concerned with the cost to the purchaser just as much as with the net price received by the seller." (p. 362.)
>
> "There is likewise no merit in complainant's contention that by his order the Administrator was seeking to control business practices in violation of the Act. It is obvious that what he sought to do was to determine the parties by whom the tax was to be borne and to prevent its being passed on to ultimate purchasers." (p. 364.)

In *Galban Lobo Co. v. Henderson* (C.C.A. 1942), 132 F. (2d) 150, cert. den. 63 S. Ct. 530 (1943), the Court ruled that the seller had to decrease its base price, in order to keep its delivered price under the ceiling, in the face of an increase in the freight charges.

Thus control by the Administrator of the incidence of taxes and other charges is necessary to effective price control and has been upheld by the Emergency Court which has jurisdiction to pass on the validity of such provisions.

2. In the Court below, defendant argued at great length that the Court should take into consideration the reason why he failed to add the excise tax on the base date. (R. 33-37.) Section 15, of course, leaves no room for such consideration. Nevertheless it should be pointed out here that defendant had no

justifiable reason for his failure to pay the tax during the period in question.

The manufacturers' excise tax on automotive parts was originally established by Section 900(3) of the Revenue Act of 1918 (40 Stat. 1057, 1122) and remained in effect until 1924. It was revived by Section 606 of the Revenue Act of 1932 (47 Stat. 261), which was amended by Section 544(b) of the Revenue Act of 1941 (55 Stat. 711, 721) and incorporated in the Internal Revenue Code, 26 U.S.C. 3403; it now reads as follows:

> "Sec. 3403. *Tax on automobiles, etc.* There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:
>
> * * * * * * *
>
> "(c) Parts or accessories * * * for any of the articles enumerated in subsections (a) or (b), 5 per centum."

Soon after the revival of the tax in 1932, the question arose whether rebuilders of automotive parts were subject to the tax as manufacturers and producers, or were exempt from it as repairmen. In his Regulation No. 46, issued in 1932, the Commissioner of Internal Revenue inserted the following interpretation of the provision in question.

> *"Liable for Tax.*
>
> * * * * * * *
>
> "Art. 4. *Who is a manufacturer or producer.*

> "As used in the Act, the term 'producer' includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by completing or assembling two or more articles."

During the periods here involved Article 4 was amended only once, in the 1940 edition of the Regulation, when it was made to read:

> "Section 316.4. *Who is a manufacturer.*
>
> "The term 'manufacturer' includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or from raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles."

Treasury regulations, issued under statutory authority, have the force of law.[1] It is clear under these interpretations that the rebuilding of automotive parts from junk and worn-out parts constitutes production within the meaning of Section 3403(c).[2]

If there was ever any doubt as to this conclusion, it was completely eliminated by the consistent holdings of this Court in such cases as *United States v.*

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[1]*Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920), and cases there cited: *Security First National Bank of Los Angeles v. Welch* (C.C.A. 9th, 1937), 92 F. (2d) 357, 359, cert. den. 303 U.S. 638; *Pacific Nat. Bank of Seattle v. Commissioner* (C.C.A. 9th, 1937), 91 F. (2d) 103, 105, and cases there cited.

[2]The Commissioner's opinion letters of 1932, referred to in *Skinner v. United States*, 8 F. Supp. 999, 1003, are here irrelevant since they dealt with the retreading of tires only and were moreover reversed in the following year.

Armature Exchange, Inc. (C.C.A. 9th, 1941), 116 F. (2d) 969, cert. den. 309 U. S. 685; *United States v. J. Leslie Morris* (C.C.A. 9th, 1941), 124 F. (2d) 371; *United States v. Moroloy Bearing Service of Oakland, Ltd.* (C.C.A. 9th, 1941), 124 F. (2d) 373.[1] In *Henrickson v. Seward et al.* (C.C.A. 9th, 1943), 135 F. (2d) 986, this Court followed its earlier holding, although the company involved had previously gained a contrary ruling in *Con-Rod Exchange Inc. v. Henrickson* (W. D. Wash. 1939), 28 F. Supp. 924.[2]

Thus, well before the March 31, 1942, base date, the law, at least in this circuit, had become clearly established in support of the interpretation embodied in the Commissioner's regulation, to the effect that producers of rebuilt automotive parts were subject to the tax. If defendant failed to pay it on the base date, he cannot now assert that he was mislead or left in ignorance as to his obligations under the Revenue Act. The most he can say—and this is in effect what his present position amounts to—is that, since he was able on the base date to escape payment of this tax, he should be permitted, now that the Bureau of Internal Revenue has caught up with his tax de-

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[1]To the same effect, see: *United States v. Armature Rewinding Co.* (C.C.A. 8th, 1942), 124 F. (2d) 589; *Clawson and Bals, Inc. v. Harrison* (C.C.A. 7th, 1939), 108 F. (2d) 991; *Klepper v. Carter* (C.C.A. 9th, 1923), 286 Fed. 370.

[2]Although in that case the Commissioner had permitted the unfavorable District Court decision to become final, this Court pointed out that such clear misconstruction of the statute could not become *res judicata* so as to grant petitioner a permanent illegal tax advantage over its competitors. To the same effect see *Monteith Bros. Co. v. United States* (C.C.A. 7th, 1944), 142 F. (2d) 139.

linquency,[1] to continue his avoidance of that tax by passing its full amount on to his customers. Such an argument should not prevail.

A final point should be cleared up. The requirement that defendant absorb the excise tax on its sales after September 1, 1943, does not decrease defendant's net receipts for the parts, as against the prices collected on the base date. This is so, because defendant's obligation to pay the excise tax for its sales prior to September 1, 1943, has in no way abated. Once defendant has paid these back taxes and deducted their amounts from his original receipts, he will find that his net receipts, i.e., his real prices on the base date were the same as those now claimed by the Administrator as his maximum prices. This should demonstrate conclusively that defendant's interpretation of the Regulation would in effect result in an increase of his net price over that in effect on the base date. This is clearly contrary to the provisions and purposes of the Regulation.

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[1]There is nothing in the record to support the District Court's Finding No. 4 that "prior to September 1, 1943, the Collector of Internal Revenue made no attempt to collect the said tax from * * * the defendant". (R. 43.) The fact is rather that the Commissioner did not discover defendant's failure to pay the tax until that time.

II.

THE COURT ERRED IN SUSTAINING DEFENDANT'S OBJECTION TO PLAINTIFF'S INTERROGATORIES ON THE GROUND THAT THE INSTANT PROCEEDING CONSTITUTES A "CRIMINAL CASE" WITHIN THE MEANING OF THE FIFTH AMENDMENT.

The District Court's order sustaining defendant's objection to plaintiff's interrogatories is clearly erroneous. (R. 21.) While the facts sought in the interrogatories were subsequently stipulated to by defendant (R. 27-28), the reasoning on which the Court's order was based is clearly in error and, unless corrected, will constitute a dangerous precedent for future cases.

In its order, the Court below sustained defendant's objection on the ground that the instant proceeding constituted a "criminal case" within the meaning of the Fifth Amendment, in which defendant could not be compelled to testify, since "incriminating testimony might be elicited from defendant here which would enable his conviction in a criminal case." (R. 26.) This ruling is evidently based on a confusion. The scope of the constitutional privilege differs with the proceeding in which it is involved. It permits any person, whether defendant or witness, in any proceeding, whether civil or criminal, judicial or administrative, to refuse to give testimony on any specific question where his answer might tend to incriminate him. In addition to this broad protection, the defendant in a criminal case has the privilege of

refusing to testify altogether.[1] If the present action is a criminal case then the Court committed no error in sustaining defendant's objection to the interrogatories. On the other hand, if it is a civil proceeding the Court clearly erred. Thus, in *Helvering v. Mitchell,* 303 U. S. 391, 402, the Supreme Court said:

> "* * * Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury, or if the prescribed proceeding is in the form of a civil suit, a verdict may be directed against the defendant; there is no burden upon the Government to prove its case beyond a reasonable doubt, and it may appeal from an adverse decision; furthermore, *the defendant has no constitutional right* to be confronted with the witnesses against him, or *to refuse to testify;* and finally, in the civil enforcement of a remedial sanction there can be no double jeopardy."[2]

Whether an action is a civil or criminal case does not depend on the form of the proceedings because,

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[1]VIII *Wigmore on Evidence* (3rd Edition, 1940), § 2252, p. 325. The same rules of evidence which prevail at trial also govern discovery examinations under the Federal Rules: II *Moore's Federal Practice* (1938), § 26.13, p. 2478.

[2]In connection with the statement that a defendant in a case other than a criminal case may not refuse to testify, the court, in footnote 12 (303 U.S. 404) said:

> "We do not construe *Boyd v. United States*, 116 U.S. 616, or *Lees v. United States*, 150 U.S. 476, as holding to the contrary where the sanction involved is remedial, not punitive."

as the Supreme Court pointed out in *Helvering v. Mitchell,* 303 U. S. 391, 402, note 6:

> "Even though Congress may not provide civil procedure for the enforcement of punitive sanctions, nothing in the Constitution prevents the enforcement of distinctly remedial sanctions by a criminal instead of a civil form of proceeding.

On the contrary, whether a case is a civil or a criminal case depends on whether or not the sanction to be enforced is imposed solely for the purpose of punishment on the one hand, or for the purpose of repairing past wrongs or preventing future injuries on the other. If the sanction is intended solely as punishment, the action is criminal. On the other hand, if it is intended to compensate for past wrongs or to protect against future injuries, the sanction is civil and remedial.

If the objection of the sanction is to protect against future injuries it is remedial notwithstanding the fact that the person by whom the sanction may be enforced has suffered no pecuniary injury. *United States ex rel. Marcus v. Hess,* 317 U. S. 537; *Helvering v. Mitchell, supra.* In other words, even a penalty may be a remedial and not a criminal sanction for the purpose of determining whether or not the constitutional rights against double jeopardy and self-incrimination may be invoked.[1] For example, the Supreme

[1] Different tests may be applicable for the purpose of determining whether a liability (1) survives, (2) is probable in bankruptcy, (3) is deductible in computing income taxes, or (4) if created by one state must be enforced by another. In all such cases it becomes important to determine whether or not the liability is compensatory or noncompensatory.

Court has classified as remedial the penalties prescribed by the Contract Labor Law. (*Helvering v. Mitchell,* 303 U. S. 391, 402, note 6.) As Mr. Justice Brandeis said in the case last cited (399):

> "Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted. Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789. Act of July 31, 1789, c. 5, § 36, 1 Stat. 29, 47. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." (Citations omitted.)

In support of this proposition the Supreme Court cited *Chicago, Burlington & Quincy Railway Co. v. United States,* 220 U. S. 559, which was an action to enforce a penalty prescribed by the Safety Appliances Act; *Oceanic Steam Navigation Co. v. Stranahan,* 214 U. S. 320; and *Lloyd Sabaudo Societa v. Elting,* 287 U. S. 329, involving penalties prescribed for bringing diseased aliens or seamen into the United States, as well as numerous other cases involving similar types of penalties.

In *Helvering v. Mitchell, supra,* the Supreme Court laid down three tests for determining whether a sanction is criminal or remedial:

First, whether the sanction is of the type which has been traditionally regarded as remedial;

Second, whether the sanction may be enforced by a civil proceeding. In this connection the Supreme Court said (401):

> "3. In sections 276 and 293, 26 U. S. C. A. §§ 276, 293 and notes, it provides that collection of the 50 per centum addition, like that of the primary tax itself, may be made 'by distraint' as well as 'by a proceeding in court.' If the section provided a criminal sanction, the provision for collection by distraint would make it unconstitutional. [Citations omitted.] That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal, sanction. * * *"

Third, whether in addition to the particular sanction a distinctly criminal sanction is provided.

Applying these tests the sanction imposed by Section 205(e) of the Emergency Price Control Act is distinctly remedial. Its purpose is not to punish but to protect the public against inflation. It is of a type which has been traditionally regarded as remedial—as much so as the penalties prescribed by the Immigration Laws and the Safety Appliances Act. It can only be enforced in a civil action. And in addition to it, Congress by Section 205(b) of the Act has provided a distinctly criminal sanction.

In view of the foregoing, it is clear that the Court erred in sustaining the defendant's objections to plaintiff's interrogatories.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed and the cause remanded with instructions to grant judgment for the plaintiff in the sum prayed for in the complaint.

Dated, San Francisco,
October 16, 1946.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED.

Sec. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction restraining order, or other order shall be granted without bond.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its

discretion may determine: Provided, however, that such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior

to the institution of the action in which such judgment was rendered.

Maximum Price Regulation 452.

Article IV—Miscellaneous.

Sec. 15. Federal and State Taxes, (a) Any tax levied by any statute of the United States or statute or ordinance of any state or subdivision thereof which the manufacturer on March 31, 1942, added to the price paid by the purchaser shall not be included in the maximum price but may be collected by the manufacturer in addition to the maximum price if such tax is stated separately from the purchase price, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part.

(b) Any tax upon the sale or delivery of a part and any compensating use tax upon a part levied by any statute of the United States or statute or ordinance of any state or subdivision thereof and becoming effective on or after March 31, 1942, may also be collected by the manufacturer making such taxable sale or delivery in addition to the maximum price if such tax is stated separately from the purchase price, unless the manufacturer had increased his price on or before March 31, 1942, to reflect such new or increased tax, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part.

(c) (1) Any separately stated tax paid by a manufacturer on a part purchased for resale may be collected by such manufacturer in addition to the maximum price upon the resale of such part unless

the price in effect on March 31, 1942, reflected the amount of such tax.

(2) Any tax paid by a manufacturer upon the purchase of a component of a part which can be delivered separately from the principal assembly of the complete part may also be collected by the manufacturer upon the sale of the part as well as upon the sale of the component separately, if such tax is stated separately from the purchase price, unless the manufacturer's price for the component or the part in effect on March 31, 1942, reflected the amount of such tax.

(d) A tax on transportation of parts imposed by section 620 of the Internal Revenue Act of 1942, for the purpose of determining the applicable maximum price, shall be treated as a cost of transportation. It shall not be treated as a tax for which a charge may be made in addition to the maximum price.

Title 26 United States Code.

§ 3403. Tax on automobiles, etc.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold:

(a) Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semi-trailer chassis, truck and bus trailer and semi-trailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semi-trailer (including in each of the above cases parts or accessories therefor

sold on or in connection therewith or with the sale thereof), 5 per centum. A sale of an automobile truck, bus, or truck or bus trailer or semi-trailer, shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(b) Other automobile chassis and bodies, chassis and bodies for trailers or semi-trailers suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 7 per centum. A sale of an automobile, trailer, or semi-trailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(c) Parts or accessories (other than tires and inner tubes and other than radios) for any of the articles enumerated in subsection (a) or (b), 5 per centum; * * *

§ 3441. Sale Price.

(a) In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.